No. 88-266

In The

Supreme Court of the United States

October Term, 1988

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JAN GRAHAM, et al.,

Respondents.

BRIEF OF RESPONDENTS, JAN GRAHAM AND THE CHICKASAW NATION

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PRELIMINARY MATTER
QUESTIONS PRESENTED

(1) Does a complaint filed in a state court alleging the right to enforce state tax laws against a federally recognized Indian tribe and asserting subject matter jurisdiction raise a federal question?

(2) Does a court have subject matter jurisdiction in an action against a federally recognized Indian tribe absent an unequivocally expressed waiver of immunity by the tribe and Congress?

(3) Where the state court from which an action is removed to the federal district court does not have subject matter or in personam jurisdiction is the federal court correct in dismissing rather than remanding to the state court?

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondents, Jan Graham and the Chickasaw Nation, Defendants-Appellees in the courts below, respectfully pray that the decision of the United States Court of Appeals for the Tenth Circuit be affirmed.

RESTATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation of Oklahoma is one of the federally recognized Five Civilized Tribes. It was removed to south central Oklahoma in the early nineteenth century. Sulphur, Oklahoma, is located within the tribe's original reservation after removal. The same territorial boundaries are provided for in its present constitution adopted with the approval of the Secretary of the

Interior in 1983. (JA 20), see preamble. The Chickasaw Nation purchased the Chickasaw Motor Inn at Sulphur, Oklahoma, from the Economic Development Administration in 1972 with tribal trust funds as an economic development project. (JA 14). Respondent, Jan Graham, who was the tribe's manager of the enterprise is no longer an employee. The issues concerning Graham are therefore moot and since Petitioner has not addressed any issues relating to her in its brief neither do the Respondents.

The Motor Inn property is among a number of scattered tracts of trust land owned by the Chickasaw Nation totaling hundreds of acres, some of which were reserved from the allotment process and some purchased. All are within the boundaries of its original reservation. The Motor Inn site was subsequently conveyed to the United States in trust for the Chickasaw Nation. (JA 16). Petitioner does not dispute that the enterprise is situated on "Indian Country" (Pet. Brief, p.29) but for this Court's information, the United States District Court for the Eastern District of Oklahoma in another case involving an attempt to regulate bingo gaming at the Motor Inn, has determined it to be situated on "Indian Country" as defined by 18 U.S.C. §1151(a) and decisions of this Court.[1] Bingo gaming is regulated by an Act of the Chickasaw Legislature. (JA 21).

2. The Proceedings Below.

Respondents accept the first two paragraphs of Petitioner's "2. The Proceedings Below" and add the following in lieu of the remainder of Petitioner's statement.

Finding federal question jurisdiction, the district court denied the motion to remand saying: "It is apparent

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[1] *Chickasaw Nation et al. v. The State of Oklahoma, ex rel. Fred Collins,* District Attorney for Murray County, Oklahoma, et al., case number 86-32-C. A copy of the court's unpublished and unappealed from decision and is found as Appendix B to Respondents Brief in Opposition to the Petition for Certiorari.

from reading the petition that the State of Oklahoma is attempting to enforce its revenue statutes against a federally recognized Indian tribe, the Chickasaw Nation". (JA 10 and A-25, 26, Pet. for Cert.). The Court then sustained the Respondents' motion to dismiss on the basis that Respondents' sovereign immunity from unconsented suit deprived the court of subject-matter jurisdiction. (JA 11 and A-27, Pet. for Cert.).

The Tenth Circuit Court of Appeals affirmed. It rejected Petitioner's "well-pleaded" complaint argument stating that it had couched its "necessarily federal cause of action solely in state law terms" and that the substance of the claim was an attempt by the State "to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe". (JA 17 and A-12, Pet. for Cert.).

This Court granted certiorari, vacated the judgment of the circuit court, and remanded for further consideration in light of *Caterpillar, Inc. v. Williams,* 107 S.Ct. 2425 (1987). On remand the circuit court reaffirmed, finding *Caterpillar* inopposite because in this case federal question jurisdiction was "inherent within the complaint" and that the Petitioner had "attempted to "well-plead" its complaint . . . and thereby avoid the Chickasaw Nation's sovereign status". (A-3, Pet. for Cert.)

SUMMARY OF ARGUMENT

The threshold issue presented here is whether a complaint seeking to enforce state tax laws against an Indian tribal government in a state court presents a federal question. Examination of the complaint in this case shows on its face that it asserts the right to limit at least two aspects of federally conferred tribal sovereignty, i.e. the right to be free of application of state tax laws to tribal activities on trust lands and jurisdiction of the state's courts. Petitioner argues that these issues should not be considered for purposes of federal question determination as if the rights asserted are either a foregone conclusion or can have their presence in this case only as a defense. Either argument is without merit. There are no

federal statutes making Oklahoma's tax laws and the jurisdiction of it's court applicable to the Chickasaw Nation. Suits to limit aspects of Indian tribal sovereignty present federal questions based on federal common law. The underlying right, if it exists, for Petitioner to pursue its claim in a state court originates and is governed entirely by federal law. In other words, whether the State may apply its laws and whether its courts have subject matter jurisdiction are in themselves questions which arise under federal law. Moreover, because of the trust responsibility of the federal government and the exclusive plenary authority of Congress over Indian tribes, the complaint presents the not insubstantial federal issue of whether the rights asserted involve a non-justiciable political question. This complaint facially presents federal question jurisdiction because of the true nature of the suit, i.e. the parties involved and the necessarily federal issues presented and the rights at stake.

The well-pleaded complaint rule is not applicable to this case because a state law cause of action against an Indian tribe is unavailable here. Any cause of action by a state government against an Indian tribal government is federal no matter how it is pleaded. The Petitioner has attempted to engage in artful pleading by omitting essential elements of its necessarily federal cause of action, i.e. the federal source of the right to enforce its tax laws and subject matter jurisdiction in the state courts. This effort is an obvious attempt to close off Respondents' access to a federal forum. This is not a case of the plaintiff being master of its claim. Rather, it is a suit where the Petitioner seeks to circumvent and frustrate the intent and plenary authority of Congress.

Application of state tax laws on Indian tribal governments and tribal immunity from unconsented suit is completely preempted, by federal common law, treaties, and statutes. Public Law 280, 25 U.S.C. §1360 and 25 U.S.C. §1322; Indian Self-Determination and Education Act, 25 U.S.C. §450, 450(N); Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §501, Indian Gaming Regulatory Act of 1988, Senate Bill 555, Congressional Record, September

15, 1988, S 12657 et seq.; *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1984); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1919); *Turner v. United States*, 248 U.S. 354 (1919). The preemptive force of these authorities, together with various treaties, the plenary power of Congress, the federal interest as the trustee for the tribes, and numerous other federal judicial decisions forming federal common law is so powerful as to completely displace any state cause of action if one even exists.

The state court from which this case was removed was without subject matter or in personam jurisdiction. Absent the necessary derivative jurisdiction for removal purposes remand was improper and the lower court correctly dismissed. *Minnesota v. United States*, 305 U.S. 382, 389 (1939).

Sovereign immunity from suit for Indian tribes in Oklahoma and subject matter jurisdiction of the state court is dependent not on whether the cause arises on a reservation or Indian country but the will of the United States Congress. Even if geographical considerations were the criteria, Congress never expressly disestablished the Chickasaw reservation by enacting the Curtis Act. 20 Stat. 495 and, in any event, this Act was repealed entirely by the OIWA, supra.

The Tenth Amendment argument advanced by Petitioner fails because of the unique relationship of the federal government and Indian tribes and the plenary power of congress reserved in the Indian Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution. This is further evidenced by the proviso in Oklahoma's Enabling act wherein Congress retained jurisdiction over Indians and their affairs. The right to apply tax laws and to have subject matter jurisdiction over Indian tribes and their affairs must be expressly conferred by Congress. Moreover, these may be issues involving political questions which this Court should defer to the proper department.

This case was properly dismissed for lack of subject matter and in personam jurisdiction.

ARGUMENT

I. THE LOWER COURTS CORRECTLY RULED THAT THIS CASE WAS PROPERLY REMOVED FROM THE STATE COURT BECAUSE THE PETITIONER'S CLAIM NOT ONLY ARISES OUT OF BUT IS COMPLETELY PRE-EMPTED BY FEDERAL LAW

After removal, the federal district courts exercise threshold jurisdiction to determine jurisdiction. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Minnesota*, supra at 389. If the subject matter is exclusively within the state court's jurisdiction the court will order remand. An exception is where the state court lacks either subject-matter or in personam jurisdiction the federal court must dismiss rather than remand. It has been said that "jurisdiction of the federal court on removal is, in a limited sense, a "derivative jurisdiction," *Minnesota*, at 389; *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 383 (1922); *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 288 (1922) and the court is required to dismiss rather than remand even though the federal district court might have had original jurisdiction had the case been initially filed with it.[2] It is in the latter category that the Circuit Court cast the present case.

Respondents now turn to Petitioner's contention that federal question jurisdiction for removal was absent.

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[2] This rule was abolished on June 19, 1986, after this cause was removed by amendment to 28 U.S.C. §1441. Subparagraph (e) now provides:

> "The court to which such action is removed is not precluded from hearing and determining any claim in such civil action because the state court from which such civil action is removed did not have jurisdiction over the claim."

A. Federal Question Jurisdiction Arising Out Of Federal Common Law, Federal Statutes, Treaties, And The Constitution Appears On The Face Of The State's Complaint

While this country's recognition of Indian tribal sovereignty antedates the United States Constituion, it was expressly acknowledged in the often cited Indian Commerce Clause, which provides that the Congress shall "regulate commerce . . . with the Indian tribes." Judicial decisions interpreting this provision have come to form federal common law as it relates to Indian sovereignty. It has been said "as distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; " . . . *Western Union Tel. Co. v. Call Publ. Co.*, 181 U.S. 92 (1901). The federal courts have carved out the meaning and perimeters fo the sovereignty of Indian tribes down through the years commencing with the so-called Marshall Trilogy[3] up to *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L.Ed.2d 244 (1987). Concededly, the sovereignty of Indian tribes has seen limitations imposed on it in recent years, but the federal courts have not wavered regarding absolute immunity from unconsented suit, taxation of tribes on Indian trust lands, and the presence of state court jurisdiction being matters of federal law within the exclusive province of the Congress. *Cabazon* at N.17, *Puyallup Tribe*, supra at 172-173 (1977).

While this Court, as far as is known to Respondents, has not had an occasion to address the "arising out of"

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[3] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1 (1831); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) (1832)

requirement of 28 U.S.C. §1441 where an Indian tribe was the movant, it has addressed the applicability of federal common law as the basis for federal question jurisdiction as it relates to 28 U.S.C. §1331. The test for each statute is essentially the same. *Franchise Tax Board v. Labors Vacation Trust*, 463 U.S. 1, 8-9 (1983); *Garrett v. Time – D.C. Inc.*, 502 F.2d 627, 629 (9th Cir. 1974), Cert. Den., 421 U.S. 913 (1975). This Court considered the meaning of "The laws . . . of the United States" as contemplated by §1331 in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) and after reviewing a number of circuit court decisions concluded:

> "We see no reason not to give 'laws' its natural meaning . . . and therefore conclude that §1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."

The question first arose in the context of federal Indian law in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974). This court said:

> "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and *absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.*" (emphasis supplied)

See also *The New York Indians*, 5 Wall. 761, 69, 18 L.Ed. 708 (1866).

In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985) the Court held that where limitations on Indian tribal sovereignty and the extent to which it has been curtailed are at issue, the case arises out of federal common law. Mr. Justice Stevens, speaking for a unanimous court, said:

> " . . . It is well settled that this statutory grant of 'jurisdiction (section 1331) will support claims founded upon federal common law as well as those of a statutory origin'."

An inquiry into whether Congress has in fact limited tribal sovereignty in a given case necessarily triggers

federal concerns. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). There are no federal statutes which make Oklahoma's statutory or decisional laws applicable to the Chickasaw Nation in its activities on its trust lands and, therefore, the controlling law in this matter remains federal common law. *Oneida* at 674.

This Court found in *Oneida* that the complaint basically alleged a state cause of action for possession and ejectment. Id. at 683. However, it determined the possessory rights asserted were federal in nature and said " . . . we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law". The court emphasized that the "underlying right" to the possession sought did not "arise[s] only under state law". Id. at 676. Petitioner is asserting that the "underlying right" to impose Oklahoma's tax laws on the tribe and of its courts to assume jurisdiction of tribal governments arises from the state statutes cited in its complaint. Therein lies the federal question.

The tribal sovereignty the Petitioner's complaint seeks to limit is not only protected and guaranteed by the federal common law but federal statutes and treaties as well. (The treaties and statutes not codified in the United States Code cited herein are contained in a separate appendix filed with the Clerk of the Court.)

The chief concern and consideration of the Chickasaw Nation for removal to Indian territory was the desire to be free of state jurisdiction and control. The preamble to their first treaty dealing with removal provides in pertinent part:

> "The Chickasaw Nation find themselves oppressed in their present situation; by being made subject to the laws of the states in which they reside . . . "

Treaty of 1832 at Ponotoc, 7 Stat. 381. Article II of the Treaty of 1834, 7 Stat. 456, promised that if they would give up their lands east of the Mississippi:

> " . . . the government of the United States, hereby consents to protect and defend them against the *inroads* of any other tribe of Indians, and *from the*

Whites; and agree to keep them without the limits of any state or territory." (emphasis supplied)

When the Chickasaws were removed they were located on lands previously ceded to the Choctaw Nation in 1830 by the Treaty of Dancing Rabbit Creek, 7 Stat. 333. That treaty in its Article IV provided:

> "The government and people of the United States are hereby obligated *to secure to the said Choctaw Nation* of Red People *the jurisdiction and government of all the persons and property that shall be within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People or their descendents*; and that no part of the land granted them shall ever be embraced in any territory or state but the *United States shall forever secure said Choctaw Nation, from and against, all laws* except such as from time to time may be enacted by their own National Councils not inconsistent with the constitution, treaties and laws of the United States; and except such as may, and which have been enacted by the Congress under the constitution are required to exercise a legislation over Indian affairs". (emphasis supplied)

Article I of the Treaty with the Choctaw and Chickasaw of 1837, 11 Stat. 573, provided the Chickasaws were to be assigned lands within the limits of the Choctaw Nation "to be held on the same terms that the Choctaws now hold it". The Chickasaw Motor Inn is situated on lands granted under these treaties. Concededly, that portion of these treaties which agrees that the tribal lands would not be included within a state or territory has been abrogated but the promise to be free of state law and jurisdiction remains until Congress should decide otherwise.

The treaty with the Choctaw and Chickasaw, 1866, 14 Stat. 769 re-established the tribes relationship with the United States after the Civil War. It provided for such things as abolition of slavery, reorganization and recognition of the tribal governments, possible future allotment of their lands in severalty, etc. Article 33 provided that if allotment was accomplished:

> "All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be the common property of the Choctaw and Chickasaw Nations, in their corporate capacities, subject to the joint control of *their legislative authorities*." (emphasis supplied)

Article 39 promised that licenses to sell goods and provisions would never be required of the tribe:

> "No person shall expose goods or other articles for sale as a trader without a permit of the legislative authorities of the nation he may propose to trade in; *but no license shall be required to authorize any member of the Choctaw or Chickasaw Nation to trade in the Choctaw or Chickasaw country who is authorized by the proper authority of the nation, nor to authorize Choctaws or Chickasaws to sell flour, meal, meat, fruit, and other provisions, stock wagons, agricultural implements, or tools brought from the United States into the said country*." (emphasis supplied)

The Petitioner's complaint likewise raises the federal question as to whether this treaty provision deprives the state court of subject matter jurisdiction. It goes to the heart of the claim that Petitioner can enforce its tax laws and require the tribes to purchase sales tax licenses and tobacco sales permits. While much of this treaty has been abrogated, Respondents submit that this provision remains in full force and effect as a solemn binding promise of the United States.

Finally, Article 45 of this treaty provides:

> "All the rights, privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Petitioner's complaint requires the application and interpretation of all of the aforegoing treaty provisions.

The Chickasaws sovereignty is also beneficiary to Oklahoma's Enabling Act of 1906, 34 Stat. 267 §1. The proviso to this section states:

" . . . provided, that nothing contained in the said constitution shall be construed *to limit or impair the rights of persons or property pertaining to the Indians of said territories* (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this Act had never been passed." (emphasis supplied)

This is a clear expression by Congress that it fully intended to retain protective authority over Indians and their governments. *Ex-parte Webb*, 225 U.S. 663, 683 (1912).

Respondents submit that federal question jurisdiction appears on the face of Petitioner's complaint. (JA 1) The style or caption of the complaint gives the first clue. It says that it is filed in a state district court, that the Oklahoma Tax Commission is plaintiff and one of the defendants is the "Chickasaw Nation". The complaint alleges that an Indian tribe is "refusing" to obey state laws. The prayer for relief seeks an order enjoining the conduct of an Indian tribal government. This conspiciously informed the district court that the State was seeking to impose its sovereignty to limit tribal sovereignty in a state court. Inquiry as to the federal source of this right and the subject matter jurisdiction of the court becomes immediately necessary. The respective rights of each have their origins in and are governed by federal law. Well-pleaded complaint? Appellees submit not. While the "artful pleading rule" will subsequently be more fully discussed, it is submitted that the complaint is probably not even artfully pleaded, the federal question is so apparent. In fact, federal question jurisdiction should not escape a law student who has completed the first basic course in Indian law.

Petitioner has selectively extracted passages from *Gulley v. First National Bank*, 299 U.S. 109 (1936) in its protestations concerning lower court rejection of its well-

pleaded complaint theory. It contends that *Gulley* provides a hard and fast rule requiring that only the language on the face of the complaint, taken literally, may be considered in determining whether federal question jurisdiction for removal exists. It is conceded that portions of *Gulley* support an absolutist approach, but Respondents do not believe that was Justice Cardoza's intention. If it was he would not have said:

" . . . Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise *unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends*'." Id. at 113-114. (emphasis supplied).

However, *Gulley* is distinguishable on its facts. The basis for the alleged cause of action there was a contract promising to pay a tax imposed by state statute. The contract was created and governed by state law. The Court said that the possibility that a federal statute might bar the collection of the tax did not create a federal question. In the present case, the underlying cause of action, if one exists, is entirely dependent on federal law, i.e. Congress must confer state authority to tax Indian tribal governments and subject matter jurisdiction on state courts to enforce the tax. The states have no power to create such a cause of action or jurisdiction.

Petitioner would have the federal courts apply selective portions of *Gulley* to the exclusion of the complete preemption and artful pleading exceptions to the well-pleaded complaint rule by ignoring the real nature and substance of this case. However, this argument is untenable because these exceptions were developed over thirty years after *Gulley* and the Court there even recognized a need for flexibility as is demonstrated by the above quoted passage. The federal nature of the right to be

established is controlling. *Gulley*, Id. at 114. Clearly, the underlying right to the claim asserted by the State has its very underpinnings in federal law, not state law. *Oneida*. Indeed, it is federal law that must breathe the first breath of life into those claims. That initial breath that is the "underlying right" can never have its origins in state law until Congress says otherwise. The "state statutory baggage" referred to by the Circuit Court in its first decision (JA 17) is only secondary and incidental to the resolution of this dispute.

"To reach the underlying law we do not travel back so far" *Gulley*, id. at 116, because of the federal nature of the right asserted. Likewise, "this is not a case where the *underlying right* or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation as was the case in *Gulley*" as this Court said in *Oneida* at 675. There are no state law causes of action against the Chickasaw Nation. Moreover, the complaint here meets the additional demand that it reveals a "dispute or controversy respecting the validity, construction or effect of law upon the determination of which the result depends." Id. at 677.

The Petitioner asserts that in order to be removed the alleged cause of action must be created by federal law. Assuming, arguendo, that the cause of action alleged here is created entirely by state law and the underlying right to assert it is immaterial, *Franchise Tax Board* provides an alternative basis for removal. It is found in the same sentence of the opinion with the rule relied on by Petitioner. At page 28 this Court said "or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law". The federal issues in this case are not insubstantial. Indian sovereignty and all its attending attributes are indeed important and can only be limited or extinguished with the consent of the federal government. *Wold Engineering*, supra at 890-891. Surely it cannot be seriously asserted that immunity from suit, which is so vital to tribal self-governance, and the federal trust relationship, is not as important as rights to land were in *Oneida*. If states could unilaterally confer

authority to themselves over Indian tribal governments and jurisdiction on their courts to enforce their authority, the tribes would govern nothing and congressional plenary power and the federal government's trust responsibilities would be meaningless. The federal question arises, in the first instance, in asserting the right to limit the Chickasaw Nation's sovereignty and therefore, facially presents removal jurisdiction based on federal common law, statutes, and treaties.

In addition to those matters heretofore discussed this case involves a very serious federal issue as to whether the rights asserted involve a political question and are therefore nonjusticiable. This will be discussed more fully in the second proposition. As was so elaborately developed in Petitioner's brief, the availability of the relief sought turns entirely on federal common law as established by this Court, congressional intent, treaties, and the Indian Commerce Clause, supra. The federal district court would have had original jurisdiction in this case had it been initially filed there. *National Farmers Union, Merrion*, etc. The issues presented clearly arise out of "the laws" and the federal district court could have proceeded to determine them had it not been without in personam, subject matter, and derivative jurisdiction for purposes of removal.

B. The Well-Pleaded Complaint Rule Is Inapplicable In This Case Because Petitioner Has Attempted To Artfully Plead A Cause Of Action Completely Pre-Empted By Federal Law

The first time certiorari was granted, this Court vacated the lower court's decision and remanded for reconsideration in light of *Caterpillar*, supra. The Circuit Court on remand, found *Caterpillar* "inopposite to the facts in this case and adhered to its original ruling that the well-pleaded complaint rule did not apply."

In *Caterpillar* plaintiffs were hired by a tractor company to fill positions covered by a collective bargaining agreement. Their employment was eventually changed to

positions outside the coverage of the collective bargaining agreement. During this period the tractor company allegedly created implied individual employment contracts with plaintiffs by making representations that they would have indefinite employment and that if that facility were closed employment would be provided at other locations. Plaintiffs were subsequently returned to an employment status covered by the collective bargaining agreement. Thereafter, they were told the plant would be closed and they were to be laid-off. Rather than pursue their federal remedies under the collective bargaining agreement, plaintiffs optioned to sue on the alleged implied individual employment contracts created while they were in positions outside the bargaining agreement. The tractor company removed to federal district court arguing that removal was proper because any individual contracts made with the plaintiffs "were as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements." The Court determined that this was raised as a defense and removal was improper based on the well-pleaded complaint rule.

Caterpillar is distinguishable from the instant case for a number reasons. First, the Court in *Caterpillar* found that the plaintiffs had a choice of asserting a claim founded on state law or on federal law and, as "masters of their claims" chose the former by alleging breach of the individual contracts. Here state law does not provide an alternative forum. Petitioner sued a federally recognized and protected Indian tribal government asserting the right to enforce its laws against it and to limit its federally conferred immunity from suit, rights governed entirely by federal law. There is no state law cause of action available to the petitioner absent federal statutes making state decisional and statutory laws applicable to Indian tribes and their officers. *Oneida*.

Secondly, this court found removal improper because the federal substantive labor law was injected in *Caterpillar* by way of a defense. This is clearly the rule. However, the sovereignty of the Chickasaw Nation is not raised first by way of defense. It is the federal nature of the rights Petitioner seeks to limit and its attempt to assert

state court subject matter jurisdiction over an Indian tribe that causes the federal question to emerge.

Thirdly, this court found in *Caterpillar* that the complaint was "not substantially dependent upon interpretation of the collective bargaining agreement". Here the State's complaint is entirely dependent upon interpretation of federal law. The state statutes which are merely incidental to the underlying federal rights at stake, do not require any interpretation. Once the core federal questions are decided, the application of the state statutes, if permitted, will simply follow.

Finally, the plaintiffs in *Caterpillar* could not have filed their complaint in federal court based on the theory advanced because the federal courts do not have original jurisdiction over state law causes of action for breach of contract. However, the Petitioner's complaint here clearly asserts the right to limit Respondents' sovereignty. Such right, if it exists at all, must be created and governed entirely by federal law and, therefore, meets the "arising out of" requirement for federal question jurisdiction. *Oneida* and *National Farmers*, supra.

(1) Petitioner's Complaint is Thus Far an Unsuccessful Attempt at "Artful Pleading" to Close-off Respondents Access to a Federal Forum

While not expressly characterizing it as "artful pleading" the Circuit Court clearly found the State was attempting to conceal a necessarily federal cause of action for the purpose of closing off Respondents' access to the federal court. Judge Moore in the Circuit Court's first decision in this case said:

> "The State urges us to scrutinize the face of its complaint and hold that no federal question is present to permit removal . . .
>
> We are unswayed . . . mindful instead that our inquiry into whether a federal court has removal jurisdiction and whether it may exercise its limited substantive jurisdiction is not perforce bounded by the face of the complaint. Indeed when the state plaintiff couches his 'necessarily federal cause of action solely in state law terms . . . *the federal removal*

court will look beyond the letter of the complaint *to the substance of the claim to assert jurisdiction.'* 14A Wright, Miller, & Cooper, *Federal Practice & Procedure* §3722 at 243 (1985).

The substance of the State's claim embraces the central jurisdictional issue we must decide in this appeal. *Indeed, when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.*

This recognition underscores the implicit federal question lodged in the State's complaint and focuses our inquiry (omitting citations)." 822 F.2d 951, 954. (emphasis supplied)

On remand, the Circuit Court said:

"The named defendant is the Chickasaw Nation, a sovereign entity whose status is subject to and limited by congressional power alone . . .

The State attempted to 'well-plead' its complaint by envoking only state revenue laws and thereby avoid the 'Chickasaw Nation's sovereign status. However, the complaint is not well-pleaded' and consequently falls outside the boundaries *Caterpillar* set." 846 F.2d 1258, 1260.

This Court acknowledged the "artful-pleading" rule in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981). At footnote 2 of Chief Justice Rehnquist's opinion for the Court, he said:

". . . as one treatise puts it, courts 'will not permit plaintiffs to use artful pleading to close off defendants' right to a federal forum . . . occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization', 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §3722, pp 564-566 (1979).

. . . The District Court applied that *settled principal* to the facts of this case . . . " (emphasis supplied)

There is nothing to prevent a court from "engaging in a little statutory logic" to deduce elements implicit on the face of the complaint. *Charles D. Bonanno Linen Service Inc.*

v. McCarthy, 708 F.2d 1, 4 (1st Cir. 1983), Cert. Den., 464 U.S. 936 (1983). The recitation of a series of state statutes should not render the federal courts mindless so they may not use logic to deduce elements of a federal claim implicit on the face of a complaint. Nor should such practice be allowed to defeat or frustrate the intent and plenary authority of Congress.

Subject matter jurisdiction cannot be waived and should be affirmatively shown. *Gainsville v. Brown Consumer Invest. Co.*, 277 U.S. 55, 59 (1928). Tribal sovereign immunity is jurisdictional. *Ramey Const. Co. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 318 (10th Cir. 1982); *People ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 & N.1 (9th Cir. 1979). A judgment by the ocurt without subject matter jurisdiction is void. *State ex rel. Hunt v. Green*, 508 P.2d 639, 642 (Okl. 1973). The Court does not acquire subject matter jurisdiction merely because a defendant fails to raise it as a defense. Therefore, it is immaterial whether it is raised as defense or not. The burden is on the petitioner to establish jurisdiction and not on the Court or Respondent to show its absence. Jurisdiction " . . . must affirmatively appear on the record". *Roberts v. Jack Richards Aircraft Co.*, 536 P.2d 353, 354-355 (Okl. 1975); *Crescent Corporation v. Martin*, 443 P.2d 111, 117 (Okl. 1968). The Circuit Court below found the complaint was not well-pleaded because jurisdiction was not affirmatively alleged. A litigant has a duty to the courts to be candid and to allege matters it knows are essential to jurisdiction. It should not play fast and loose with the Court and assert claims and name parties over which it knows the state court does not have jurisdiction. It is astonishing that Petitioner continues to play this exercise in cleverness to the hilt, straight-facedly "nothing was concealed in the State's petition" and that "the Federal Government takes no responsibility" in the tribe's business as though the federal trust relationship was meaningless. (Pet. Brief, p.9)

It should be noted that there is a reason which was quite apparent to the lower courts why this unusual

attempt was made to try the Chickasaw's sovereignty in an Oklahoma state court. The Petitioner was certainly cognizant of the long line of decision by this Court and other federal courts that adhere to the time-honored and settled rule that Indian tribes are immune from suit unless such immunity is expressly and unequivocally waived by the tribe or congress. Petitioner knew or should have known that an attempt to bring this action in the federal courts would have met with immediate doom. However, it saw another possible way to skin this cat. In 1985 the Oklahoma Supreme Court had, unprecedently and contrary to the decisions of this Court expressly holding otherwise, decided that a state district court had subject matter jurisdiction over the Seneca-Cayuga Tribe of Oklahoma for the purposes of regulating bingo on Indian country. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okl. 1985). As far as respondents know, this decision has been ignored by all federal courts in which it has been cited as authority. While the Court's reasoning one some of the issues was sound, the ultimate holding that a state court had jurisdiction over a federally recognized tribe on Indian country was consummately wrong. The Court misapplied *Wold Engineering*, supra; erroneously applied the pre-emption – infringment tests to immunity from suit and confused sovereignty in general with sovereign immunity from suit. It has been termed as "misguided" by the United States District Court for the Northern District of Oklahoma.[4] Labeled "confused and obscured" by one noted Indian law scholar[5]

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[4] *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, No. 85-C-639-B (ND Okl. 1986) where the state district court on remand was subsequently enjoined from exercising jurisdiction. (App. 33 Respondents' brief in opposition to Pet. for Cert.)

[5] C. Goldburt-Ambrose, *Public Law 280 – Termination to Self-Determination*, paper presented at a seminar entitled "The American Indian in Comtemporary Life: An Examination of Relationships Between Cultural Values and American Indian Policy", February 21-22, 1985, at the University of California at Los Angeles – American Indian Studies Center.

and criticized by another for its misapplication of settled federal law, especially in its application of the pre-emption – balancing approach as it related to tribal sovereign immunity from unconsented suit.[6] *May* was decided on July 2, 1985, and the present case filed in state court on October 18, 1985. *May* appears to have inspired the present case and is the reason the Petitioner has struggled so arduously to return it to the state court. If it is successful in returning this case to a court more receptive to assuming jurisdiction it will gamble on the odds that the Oklahoma Supreme Court will not reverse its decision in *May* and certiorari may not be granted in this Court.

(2) Petitioner's Claim is Completely Pre-empted by Federal Law

In some areas of the law congressional involvement and federal common law may be so powerfully pervasive as to completely pre-empt, and even displace, state law and jurisdiction. In the context of congressional involvement preemption may be evidenced by intent, direct or indirect, or by establishing a regulatory scheme which is

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[6] Dennis W. Arrow, Professor of Law, Oklahoma City University, *Comtemporary Tensions in Constitutional Indian Law*, 12 Oklahoma City University Law Review 469, 550-551 (1987). Professor Arrow says:

> "Essentially, the court applied preemption-balancing to override tribal sovereign immunity. This approach, however, is not supportable for several interrelated reasons. Initially, as has been noted, supreme court protection of tribal sovereign immunity has been vigorous. In *McClanahan*, the court noted that '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' In *Santa Clara Pueblo v. Martinez*, it held that 'without congressional authorization' the 'Indian Nations are immune from suit.' In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, it reaffirmed that 'in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.' Sovereign immunity, in short, is an independent doctrine, not subject to the preemption-balancing approach."

incompatible with state action. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ___, 95 L.Ed.2d 55, 63 (1987) this Court said that a corollary to the well-pleaded complaint rule is that "Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character". See also *Caterpillar* at 327. Citing *Franchise Tax Board*, the Court in *Caterpillar* also said:

> "On occasion, the court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. (omitting citations) Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. See *Franchise Tax Board* . . . ('If a federal cause of action completely pre-empts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under federal law')."

See also N.8 Id. at 96 L.Ed.2d at 328 where *Oneida*, supra, is cited by way of example. In *Franchise Tax Board*, supra, the court recognized the rule that emerged in *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) that " . . . it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint . . . " Id. at 22.

Perhaps by way of some sort of impermissible implied jurisdictional interpretation making it applicable to an Indian tribe, Petitioner cites 68 Oklahoma Statutes § 232 providing for injunctive relief to enforce state tax laws as its authority for this suit. The federal statute authorizing state court jurisdiction over Indian country is the Act of August 15, 1953, 67 Stat. 5888, as amended, 28 U.S.C. § 1360 and 25 U.S.C. § 1322, commonly known and hereinafter referred to as Public Law 280. Public Law 280 completely pre-empts the Petitioner's claimed state statutory cause of action against Indian tribes. This Court

recently spoke to this proposition in *Wold Engineering*, supra at 884-885 where North Dakota, a Public Law 280 state, sought to disclaim state jurisdiction for a claim brought be an Indian tribe unless the tribe waived its sovereign immunity from suit. Justice O'Conner speaking for the majority of the court said:

> "Public Law 280 represents the primary expression of federal policy governing the assumption by states of civil and criminal jurisdiction over the Indian Nations . . .
>
> . . . In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition the pre-emption requires 'an express congressional statement to effect'. (omitting citations)
>
> . . . Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law." (omitting citations)

Oklahoma has never met the requirements of Public Law 280. *May* at 88, supra. Petitioner's attempt at an application of state statutes in a state court to enjoin tribal activities is completely incompatible with the pre-emptive force of Congressional perogative. Simply naming an Indian tribe as a party defendant in a suit immediately raises the pre-empted federal issue of subject matter jurisdiction.

Moreover, as a matter of federal common law, the Court said in *Wold*, "Chapter 27-19's requirement that the tribe consent to suit in all civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-governance". The Court then said:

> " . . . and this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition . . . nonetheless, in the absence of federal

authorization, tribal immunity, like all aspects of sovereignty, is privileged from diminution by the states."

In a later enactment the Congress spoke more directly to its policy on the sovereign immunity. The Indian Self-Determination and Education Assistance Act, Public Law 93-638, Jan. 4, 1975, 88 State 2213 codified at 25 U.S.C. 450(N) provides:

"Nothing in this Act shall be contrued as –

(1) affecting, modifiying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an by an Indian tribe; . . . "

This is not some casual, out-of-hand statement by the Congress but a further declaration that it intends to continue to control and define substative rights to invade this aspect of tribal sovereignty.

By the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1302 Congress authorized Habeas Corpus relief against tribal officials where constitutional rights have been violated. Adoption of these and many, many other federal laws in futherance of the federal trust responsibility show with great clarity that Congress, perceives itself as having final and complete dominion over Indian tribes. The most direct statement of congressional intent regarding state authority is found in Oklahoma's Enabling Act, supra, where Congress specifically reserved authority over Indian rights and lands in Oklahoma.

The cumulative effect of federal case law dealing with taxation of Indians, immunity from suit and subject matter jurisdiction of the courts, particularly the state courts, also overwhelms state law. Although, *Oneida* supra, involved federally protected rights to land the holding there is no less relevant to the Chickasaw's right to federally protected attributes of sovereignty. There the Court's recognition of the complete preemption of federal law regarding tribal sovereignty was vividly enunciated when the Court declared federal law absolutely controlling absent Congressional edict applying state laws and jurisdiction. Id. at 674. In the present case, even if the federal statutes developing a regulatory scheme for

assuming state jurisdiction and manifesting Congressional intent did not completely pre-empt state court jurisdiction it is clear that federal common law necessarily would.

Although, erroneously characterizing the sovereign immunity issue as a "defense"[7], the dissent below recognized complete federal pre-emption in this case when Judge Tacha said "It is undisputed that federal law completely pre-empts this field". 846 F.2d 1258, 1261. Petitioner's asserted right to enforce its tax laws via coercive state court jurisdiction and, as the case was here, the state court's predisposition to exercise it by unnoticed ex-parte injunctive relief, is inconsistent with this Court's frequent holding that Congress retains plenary authority to decide when such right may exist. Complete pre-emption requires that any decision, as to whether Congress intends such right to exist, remain within the realm of federal court jurisdiction.

The federal common law as developed by this Court, the Indian Commerce Clause, Acts of Congress, and it plenary authority in this area and the federal trust responsibility operate to completely dominate and displace any state cause of action involving Indian tribes even if it existed. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. ___, 95 L.Ed.2d 55, 63 (1987). Although it has not done so often, the Congress has demonstrated when it is disposed to confer jurisdiction over Indian tribes it will do so. See Public Law 280; Indian Civil Rights Acts of 1968, 25 U.S.C. § 1301-1303; The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137, 144 § 18. And it has manifestly warned when it did not intend for its legislation Acts to be misapplied to confer jurisdiction. Indian Self-Determination Act, 25 U.S.C. § 450(N), supra. It

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[7] Respondents assert that Judge Tacha was wrong for the reasons previously stated herein and because to characterize sovereign immunity as a defense would imply that the courts would have subject matter jurisdiction over Indian tribes absent their asserting sovereignty.

would be purposeless for Congress to undertake such legislative measures unless it intended that federal law absolutely control in this regard. Respondents submit that federal influence in this field has the same powerful preemptive force as the labor laws involved in *Avco* and *Metropolitan Life*, supra.

Avco, also addresses Petitioner's complaint that if it is unable to bring this action in state court it will not have a remedy. There the Court found the absence of a federal remedy was not determinative in regard to the propriety of removal saying " . . . The broadth or narrowness of the relief which may be granted under federal law . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter". Id. at 561. See also *Franchise Tax Board*, Id. at 23 and *Caterpillar*, Id. at 96 L.Ed.2d 326, N.4.

The Chickasaw Nation should not be required to have its sovereignty tried in the state courts anymore than the state should have its sovereign powers tried in the courts of the Chickasaw Nation. The Court should affirm removal of this case to the federal district court.

II. RESPONDENTS' SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT DEPRIVED THE STATE AND FEDERAL DISTRICT COURTS OF SUBJECT MATTER AND IN PERSONAM JURISDICTION MANDATING DISMISSAL

As the Tenth Circuit Court correctly stated in its initial decision in this case "Tribal sovereign immunity is jurisdictional". 822 F.2d 951, (10th Cir. 1987) See also, *Ramey Const.*, at 318, and *Quechan Tribe of Indians*, at 1154 & N.1, supra. Tribal immunity from suit is unconditional and the absence of an effective waiver deprives the courts of subject matter jurisdiction. In this case Petitioner attempts an ambitious effort. It seeks an absolute coup d'etat for the State of Oklahoma to finally and forever obtain complete authority to enforce its tax laws against all Indian tribes residing in the state. It urges this Court

to, in a single master stroke, abolish tribal immunity from suit without regard to the will of Congress.

With the exception of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) which had nothing to do with immunity from suit, Petitioner relies on decisions involving individual Indians rather than tribal governments for the proposition that immunity from suit territorially limited. Respondents submit that this attribute of sovereignty for tribal governments is a governmental one, not subject to limitation absent an express act of congress. Whether the conduct complained of occurs on a reservation, Indian country, or Indian lands is immaterial for immunity from suit to exist. However, Respondents cannot permit petitioner's assertions in this regard to go unanswered and address them as follows:

A. The Chickasaw Reservation in Oklahoma Has Not Been Disestablished By Congress

Petitioner asserts the novel theory that Oklahoma Indian tribes are less deserving of governmental recognition and attending sovereign attributes than other tribes in the United States.[8] Petitioner's sweeping proposition to limit tribal sovereign immunity from suit based on geographical or territorial considerations is totally unprecedented, judicially or legislatively. It rests it's position principally on *Mescalero* which did not deal with the tribe's sovereign immunity from suit. There the tribe initiated the proceedings resulting in the Court's decision. This case will be discussed in greater depth further on.

As was noted in the courts below, Petitioner has not cited a single decision of this or any other federal court nor any Act of Congress whereby the state courts of Oklahoma acquire subject matter jurisdiction in this case to enforce tax laws or Indian tribal immunity from suit is

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[8] Under petitioners theory Oklahoma Indian tribes would not be the only tribes subjected to state court jurisdiction. There are many other tribes in other states whose lands have been allotted in severalty and reservations settled by non-Indians.

in anyway qualified territorially. Rather, it cites decisions dealing with other aspects of tribal sovereignty, most of which except *Mescalero*, involve rights and immunities of individual Indians as opposed to the sovereignty of their governments. As this Court noted in *Oneida* when urged to apply the well-pleased complaint rule in *Taylor v. Anderson*, 234 U.S. 74 (1914) the rules are different when applied to rights of individual Indians as opposed to rights of an Indian tribe, Id. at 676.

It is true that the United States Government during the assimilationist period engaged in a policy leading to termination of Indian tribes. As has been noted by most historians and scholars, this was a sad period in American history and it is a poor background on which to ask this court to extract such a vital aspect of tribal sovereignty. Petitioner relies principly on a case not involving sovereignty of a tribal government, reports of the Dawes Commission and the Curtis Bill, Act of June 28, 1898, 30 Stat. 495, to make its sweeping assertion that Oklahoma's Indian tribes should not have sovereign immunity from suit because their "reservations" were disestablished. Respondents submit that this is a less than comprehensive background on which this Court should make a decision resulting in such a brutal impact on Oklahoma's Indian tribes.

Petitioner contends that the cited Dawes reports "paint[s] a vivid picture of congressional intent to disestablish all reversations in Oklahoma" (Pet. Brief, p.25) and that the "statesmenship" practices (Pet. Brief, p.38) by the Dawes Commission destroyed all immunities for tribal governments in Oklahoma. Respondents suggest that a more vivid picture of Dawes effort is illustrated by the noted Indian scholar and author, Angie Debo, in her book *And Still the Waters Run*, Princeton (1940) 91:

> " . . . As the federal officials began to realize the vast helplessness and inexperience of the average Indian, they began, through a blundering process of experimentation, to try to guard his property. But because of the lack of a definite and constructive policy, and most of all because the inherent difficulty of the task

> itself, the general effect of allotment was an orgy of plunder and exploitation probably unparalleled in american history."

and another leading author of the times, commented on the reports of the Dawes Commission that claimed it was the fault of the Indians that necessitated break-up of the reservations and allotments in severalty he said:

> "The truth is that when the Five Civilized Tribes were driven from their ancient homes east of the Mississippi to make room for the early settlers, the country selected for them, and called the Indian Territory, was thought to be a wild and barren country and was then subject to the inroads of the wild roving bands of plain Indians, making life there insecure. After these savages were conquered and the country made secure and habitable by the Five Civilized Tribes, not only the great agricultural possibilities of the country became a striking fact, but, in addition, vast deposits of coal, oil, and gas were discovered. Then it was that, whetted by cupidity, the whites became as hungry wolves, seeking all they could devour, and intruders overran the Indian country, while the United States, which acknowledged the helplessness of the Indians, and its duty by treaty and morally to exclude the intruders, with the power so to do, quietly looked on and did nothing. Hence the Dawes Commission" James H. Malone, *The Chickasaw Nation*, John P. Morton & Co., (1922) at 424.

Angie Debo, also commented on the credibility of the Dawes Commission in her work, *A history of the Indians of the United States*, Univ. of Oklahoma. Press, (1970), p. 307:

> "It published annual reports, and its members testified before congressional committees and made speeches throughout the United States. These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the condition and sentiments of the Indians and in a high moral tone urged the abolition of their institutions as a deliverance to them. Greed, philanthropy, and public opinion were thus united to break down the tribes' defenses. What might have been advocated as

a measure of cold-blooded realism was represented a holy crusade."

Respondents agree that the courts look to legislative history to ascertain congressional intent to disestablish a reservation, but it must be remembered that these reports, to which Petitioner devotes more than one-fourth of its brief, are not congressional committee reports. They are simply reports of a commission established to further assimilationist policies of the times by persuading the tribes to allot their lands in severalty and thereafter implement the allotment process. More importantly it should not go unnoticed that Petitioner is unable to cite a single congressional act in which the congress explicitly disestablished the Chickasaw Nation's reservation. This Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909) Simply alloting the lands out in individual plots within the area does not change it's reservation character.

A study of the legislation cited by Petitioner resulting in allotment of the Chickasaw lands finds no expression on the part of Congress to disestablish the tribe's reservation.[9] Essentially these Acts of Congress provided for allotments in severalty to tribal members and sales of surplus lands for an undisclosed sum to be deposited for the benefit of the tribe. The tribe retained some lands including schools, churches, tribal government buildings, mineral rights, etc. The tribe continues today, to own and

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[9] We specifically refer to the Act of June 28, 1898 (Curtis Bill) 30 Stat. 495; Oklahoma's Organic Act of 1890, 26 Stat. 81; Five Tribes Act of April 26, 1906, 34 Stat. 137; and Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267. (The text of these Acts are included in the separate appendix filed by Respondents with the Clerk of the Court.)

occupy surplus lands that were not sold.[10] There is not doubt that the sales of surplus land were not for the purpose of facilitating non-Indian settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Chickasaws was akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act opening lands for settlement, alloting lands to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that members of Congress at the time of the Chickasaw allotment process probably thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . . "

A few years later the country began to take a dim view of these harsh and unworkable termination and assimilationist policies. The advent of a new policy, as it related to the Chickasaws, came with the Oklahoma Indian Welfare Act of 1936, supra. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. This brings us back to the Curtis Bill, supra, which Petitioner asserts as authority for the proposition that Congress has disestablished all reservations in Oklahoma making it an "assimilated state". Apparently it is not aware of *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)

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[10] Contrary to Petitioner's uninformed statement concerning Indian County on page 29 of its brief, the Chickasaw government retains more than 2500 acres in tracts ranging from a few acres to over 700 acres. This does not take into account thousands of acres of individually retained allotments. The Choctaw tribe retains almost 12000 acres in trust lands together with thousands of acres of individual allotments.

where the Court held that the OIWA repealed the Curtis Bill for all purposes. Reversing the district court's holding that the Creek Nation had no authority to establish tribal courts with civil and criminal jurisdiction because of the Curtis Act, the circuit court said:

> "It (OIWA) appears to cover the 'whole subject' of the earlier legislation. It would be absurd to hold that isolated portions of the Curtis Act . . . survive even through the statutory context in which they appeared – allotment and assimilation – has been stripped away by OIWA." at 1445.

Whatever the Congress might have done earlier the notion of Oklahoma being an "Assimilated state" as termed by Petitioner, was laid to rest in 1936.

Respondent's cannot allow the misinformation from Senate Report No. 1232, 74th Congress, 1st Sess., July 29, 1935, quoted on page 25 of Petitioner's brief to go without comment. The cited passages from that report involved a proposed bill considered by Congress in the 1938 session similar to the 1936 OIWA that was adopted. The bill proposed in 1935 was never adopted because it contained erroneous information about the status and condition of Oklahoma Indians and objectionable features purporting to treat Oklahoma Indians different from those to which the Indian Reorganization Act 25 U.S.C. 465 et seq. covered. Petitioner cites the legislative report on the failed bill as authority that "Congress recognized that no reservations survived Statehood" and the Oklahoma Indians were to be treated differently from tribes covered by the IRA. The following are some passages from the report submitted by the House Committee on Indian Affairs during the 1936 session which resulted in passage of the OIWA:

> "During the last session of Congress the Committee on Indian Affairs had before it H.R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions . . . This bill, in its *revised form*, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups;

> it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.
>
> This bill affects the welfare of approximately 125,000 Indians representing about 30 different tribes. This is more than one-third of the total Indian population of the United States. There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities nonexistent. Enactment of this legislation will open the door for many of these poverty-stricken people.
>
> Section 1 of the proposed substitute bill authorizes the acquisition of lands, either within or outside the boundaries of *existing reservations* or nations . . .
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> * * *
>
> By section 2 a preference right is granted the Secretary of the Interior to purchase restricted Indian land offered for sale. Exercise of this authority will permit continued Indian ownership of the land rather than to have it pass to white purchasers, and thus to increase the extremely unsatisfactory checkerboard ownership situation which has developed through past practices in disposing of surplus of heirship Indian land.
>
> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and otherwise to enjoy the benefits of organization for general welfare purposes. *In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934* . . .
>
> * * *
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> In addition to the loan appropriation authorized by section 6, Oklahoma Indians, under the provisions of section 7 will also share in any or all appropriations heretofore or hereafter made to carry out the provisions of the Indian Reorganization Act of June 18, 1934. Thus appropriations for expenses of organization,

for land acquisition, for student loans, and for industrial loans, may be used for the benefit of Oklahoma Indians.

* * *

Section 9 authorizes the Secretary of the Interior to make all necessary rules and regulations for putting this legislation into effect. The last sentence of the section repeals any legislation inconsistent with the terms of this bill." (emphasis supplied) H. Rep. No. 2408, 74th Congress, 2nd Sess., April 15, 1936.

Respondents suggest that the above report would serve this Court better in determining the intent of Congress and what it believed in 1936 as to the status of reservations and Indians in Oklahoma.

Regardless of the destruction of the tribe's land base due to the assimilationist and termination policies of the United States in the late nineteenth century and contrary to the erroneous statement by petitioner on page 23 of its brief[11], the tribal governments, though seriously weakened, remained intact and the federal government retained jurisdiction over them. The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137 § 28 expressly provided that the tribal governments were continued "until otherwise provided by law". While it is true that the tribal governments were much restricted by these congressional acts and were not very effective for several years thereafter, it is clear that the tribal governments were continued. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911). This is further evidenced by Oklahoma's Enabling Act, supra.

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[11] "It is from this beginning that the state government assumed the jurisdiction over all citizens of the state with the concurred plenary power to tax all property unless specifically restrained by federal law." While it attempts to do so here, The State of Oklahoma has never assumed jurisdiction to tax Indians on Indian country.

The executive branch only recently recognized the continued existence of the treaty boundaries of the Chickasaw Nation when the Secretary of the Interior approved its present constitution in 1983. (JA 20) The preamble of the Chickasaw Constitution "establishes" the tribal government "within the . . . limits" of the original reservation. The Chickasaw Motor Inn is within those boundaries. Petitioners claim that the Chickasaw reservation has been disestablished is without merit. Even had it been, that situation was reversed by the OIWA. *Hodel.*

B. Indian Tribes Are Immune From Suits In State Courts As To Matters Arising On Indian Country And, Petitioners Tenth Amendment Rights Aside, The Congress Had Authority To Codify This Court's Definitions In 18 U.S.C. § 1511 For Jurisdictional Purposes

This Court does not have to decide whether the original Chickasaw reservation in Oklahoma has been disestablished because the term "Indian country" has come to be synomous with "reservations" for state, federal, and tribal jurisdiction purposes. Whether conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert. Den. sub nom *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined Indian country for purposes of determining federal criminal jurisdiction in 18 U.S.C. § 1151(a)(1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered

under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate Bill 555, Indian Gaming Regulatory Act[12] Section 4(4)(B) of the Act defines "Indian lands" as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power."

Section 23 of the Act uses the term "Indian country" interchangably with "Indian lands" a number of times.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290, U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican*, Id. at 449, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States. *John*, Id. at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, in Oklahoma see *May*, supra at 82.

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that

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[12] Reported in the Congressional Record, September 15, 1988, at S 12657 et. seq. and September 26, 1988, at H 8146 et. seq. (The full text is reported as Document 9 in the separate appendix filed by Respondents with the Clerk of the Court.) It should be noted that any attempt to tax bingo revenues has been foreclosed by § 11 of that Act.

it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment.*" (emphasis supplied) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The terms "reservation" and "Indian country" are used interchangeably by the congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands." Cohen's *Handbook of Federal Indian Law* (R. Strickland Ed. 1982) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.*, Id. at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1165 (Okl. Cr. 1983).

The Chickasaw Motor Inn property was conveyed to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Chickasaw Nation and the United States Government that this tract of land would unquestionably be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this as the Court pointed out in *Oneida*, at 678:

"There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."

Mescalero, supra, on which petitioner almost places its whole case, when coupled with obiter dictum in *Oklahoma Tax Commission v. United States*, should not be applied here for several reasons. First, sovereign immunity from suit was not at issue in either case. Secondly, the leased lands involved in *Mescalero* were located outside tribe's recognized reservation. "Indian country" considerations aside, the Chickasaw Motor Inn is located within the exterior boundaries of its original reservation, Treaty of 1837, supra, and the territorial boundaries for its present day government which have been approved by the Department of Interior. (Chickasaw Constitution, preamble, JA 20). Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue in Mescalero was whether the area was on or off a "reservation" as that term was perceived at the time New Mexico's Enabling legislation was drafted not "Indian country". Footnote 11 at 155 of the Court's opinion indicates the leased lands would be accorded the same "Indian country" status as lands purchased by or conveyed in trust to the United States. However, this conclusion was reached in an entirely different context than here. There the issue was whether taxes applied to both the improvements on the land and income therefrom. Here the issue is whether the state court's have subject matter jurisdiction over Indian tribes on "Indian country".

In *Mescalero*, the lands were not owned by the tribes but merely leased, with perhaps, the thought by the tribe that it would be immune from taxation as a federal

instrumentality. In according the leased lands the same status as purchased lands under the Indian Reorganization Act, 25 U.S.C. 465 the Court noted a statement of the Solicitor General that "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe". Id. at N.11. In the present case the Chickasaw Nation already owned the lands in question in fee. They subsequently conveyed them to the United States who accepted them in trust. Respondents submit that this was not without "meaning[less]" and that it was accomplished with the calculated intent of both the tribe and the United States to cause the property to be unquestionably "Indian country" free of taxation and regulation by the state, under the control and jurisdiction of the tribe and the federal government.[13]

Lastly, if *Mescalero* stood for the proposition that lands acquired in trust under 25 U.S.C. 465 and 501 do not merit "Indian country" and "reservation" status, then that aspect of the decision was overruled five years later by *John*, supra at 649, where this Court held that lands held in trust by the United States for an Indian tribe had reservation status.

Finally, petitioner contends that causes arising out of tribal conduct on "Indian country" should not afford immunity from suit or deprive state courts of subject matter jurisdiction because it interferes with its Tenth Amendment rights. Petitioner complains that "Congress has sought to wield its power in a fashion that would

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[13] The United States District Court for the Eastern District of Oklahoma in a related case cited herein at footnote 1 involving this same property found it, on the undisputed facts, to be "Indian country" and that the "federal government has supervision and control over the tribe's activities on the land". Footnote 1 of the court's unpublished decision recited that the bulk of these facts were based on testimony of Governor of the Chickasaw Nation and the Area Director for the Bureau of Indian Affairs. (App. 20, 21, 23 App. to Brief Opposing Pet. for Cert.)

impair the State's ability to function effectively in a federal system", in reference to the application of 18 U.S.C. § 1151 for purposes of civil jurisdiction. Petitioner says § 1151 "has unconstitutionally impaired the sovereignty of this state . . . " This issue is not properly before this Court and should not be considered because it was not raised in the Courts below and Petitioner has not complied with Rule 28.4(b) of this Court requiring that notice be served on the Solicitor General when the constitutionality of an Act of Congress is drawn into question. However, its whole argument on this subject it meritless and fails for a number of reasons, the first of which is that there are other definitions of "Indian country". See *Pelican, McGowan, John,* etc., supra.

Secondly, the Tenth Amendment rights asserted by petitioner pale when tribal autonomy and the unique trust relationship tribes have with the federal government is considered. Accordingly, the Court has consistently declared that the authority of Congress over Indian tribes is plenary. The plenary congressional control over Indians is necessary to fulfill the federal trust responsibility. These principles have been reaffirmed so many times cited authority is not necessary. The Oklahoma Supreme Court has accepted the term "plenary" to mean "full, entire, complete, absolute, perfect and unqualified". *Mashunkashey v. Mashunkashey,* 134 P.2d 976, 979 (Okl. 1942) See also The Federalist No. 42 by Madison, Tudor Publishing Co., (1937) P. 285, 290. And, as this Court said in *Seber* at 718, supra, "the fact that the Acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress not the courts".[14]

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[14] Contrary to Petitioners rather overstated concerns on this subject, Respondents submit that state government in Oklahoma is not threatened by its failure to collect taxes from these modest and, often times, financially weak tribal businesses, such as the Chickasaw Motor Inn, which depends on bingo gaming to keep its doors open in the off-season.

Thirdly, Oklahoma's Enabling Act, supra, retained federal control and law making powers regarding the state's Indians and Indian tribes. *Mashunkashey* at 979, *Ex Parte Webb,* 225 U.S. 663, 378 (1912).

C. The Limits Of Tribal Sovereign Immunity From Suit And Subject Matter Jurisdiction Of The Courts Over Indian Tribes Are Subject Only To The Plenary Control Of Congress

Respondents also submit that this Court is not required to decide whether the conduct complained of is off or on "Indian Country" or "reservations" to resolve this dispute. The long established tenet that Indian tribes are immune from suit absent express and unequivocal authorization from Congress has never been qualified. The rule has always been simple, direct and straight forward. Placing any limitations on it would be removing one of the most vital aspects of sovereignty for Indian tribes and the federal trust relationship. It annoys state officials that Indian tribes cannot be treated like private corporations or associations. The state would prefer to have them reduced to mere social clubs over which they could exercise control. The Court discussed Indians and the state-tribal relationship in *United States v. Kagama,* 118 U.S. 375, 384 (1886):

> "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."

This language from *Kagama* is particularly appropriate in this case because Petitioner seeks total and absolute control by the state and its courts over Indian tribes in Oklahoma. The jingoistic tone of Petitioner's brief reveals it's disdain for the Chickasaw Nation when it refers, with apparent relish, to the "dethrone[ing]" of the tribes at page 32 and asserts at page 38 that: "There remains but one sovereign nation within Oklahoma, that being the United States of America", obvious disapproval of the use of the title "nation" by the Chickasaws.

"Although this Court has departed from the rigid demarcation of state and tribal authority laid down in

Worcester v. Georgia," supra, it has not altered the traditional concept of tribal immunity from suit and state court jurisdiction. The line of decisions recognizing this concept appears to begin with *Turner v. United States,* supra at 358 (1919) holding that the Creek Nation could not be sued in any court without tribal consent and authorization from Congress.

Counterclaims are also barred by sovereign immunity where an Indian tribe brings the lawsuit. *United States Fidelity & Guaranty Co.,* supra at 512-513. Congressional waiver will not be implied but must be express and unequivocal. *Santa Clara Pueblo,* supra at 58. *United States v. Testan,* 424 U.S. 392, 399 (1976).

Wold Engineering, supra, presented the unusual situation where the tribe was trying to get into state court. There North Dakota has required that before Indian tribes could have access to the state's court they had to waive sovereign immunity from suits. This Court declared such an arrangement unacceptable. Just O'Conner speaking for the majority, said that this requirement "serves to defeat the tribe's federally conferred immunity from suit" (476 U.S. 890) and that in the "absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states" (at 891). Declaring the North Dakota statute "unduly intrusive on the tribe's common law sovereign immunity" the court concluded that by requiring the tribe to open itself up "to the coercive jurisdiction of the state courts" invited "potentially severe impairment of the authority of the tribal government . . . "

The Court in *Wold* also addressed Petitioner's overstated complaint that "the Tenth Circuit has created in the tribe a sovereign super-entity which can sue and not be sued, make law and be subject to no law, and exercise unknown rights while at the same time ignore the existing rights of others" (Pet. Brief, p.28), where Justice O'Conner said:

> "The perceived inequity of permitting the tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, *much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted."* (at 893) (emphasis supplied)

Even when this Court has held that state tax laws are applicable to Indian tribes it has declined to encroach on the congressional perogative concerning tribal immunity from suit and subject matter jurisdiction. The Ninth Circuit Court of Appeals in *Chamehuevi Indian Tribe v. California State Board of Equalization,* 757 F.2d 1047 (1985) in an action by the tribe for declaratory judgment, held that California's cigarette tax laws could not be imposed on sales to non-Indians by the tribe on the reservation and, following this Court's teachings, further held that California's counter-claim for back taxes was barred by sovereign immunity. This Court granted certiorari and recersed as to the Circuit Court's ruling that the state could not require the tribe to collect the taxes on the state's behalf, 474 U.S. 9 (1985). The lower court's rulings upholding the tribes' immunity from suit were noticeably left intact, a clear indication that this Court will allow the Congress to decide when and to what extent tribal immunity from suit will be limited.

Analogous with the present case is *Puyallup Tribe,* supra, where the Washington state courts had held that their courts had jurisdiction to regulate the fishing activities of the tribe both on and off its reservation. The tribe asserted its immunity from suit declaring that neither it nor the congress had consented. This Court said on vacating the state court's order as to the tribe: "The attack is well founded, absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe. This court, *United States v. United States Fidelity & Guaranty Co.,* supra; . . . and the commentators, see e.g. U.S. Dept. of Interior, Federal Indian Law 491-494 (1958), all concur", Id. at 172-173. It is noteworthy that this Court vacated the state court's

restraining order entirely as it applied to the tribal government regarding both on and off reservation conduct. As a result, tribal immunity from suit remained unqualified and the plenary authority of Congress intact.

The courts of Arizona, which has a large Indian population with tribes very active in commercial activities both on and off their reservations, has said that tribal immunity from suit is not conditioned on whether the cause arises on or off tribal lands, *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-424 Ariz. 1968); *S. Unique v. Gila River Pim-Maricopa*, 674 P.2d 1376, 1379 (Ariz. App. 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507 (Ariz. App. 1985); *Dixon v. Picopa Const. Co.*, 755 P.2d 421 (Ariz. App. 1987).

This Court has declared many times that it is Congress, and not the courts, that has authority over tribal immunity from suit. The Petitioner knows this. However, it comes here, without a single precedent, requesting this Court to encroach upon what the Court has consistently recognized as Congressional perogative. The issue in this case presents a political question to be resolved by Congress. Considering declarations of this Court, the Indian Commerce Clause, treaty obligations and trust responsibility of the government Respondents suggest that this case may present the classic "textually demonstrable constitutional commitment of the issue to a coordinate political department". *Baker v. Carr*, 369 U.S. 186, 217 (1962) depriving the Courts of subject matter jurisdiction. See also *Lonewolf v. Hitchcock*, 187 U.S. 553, 568 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *Price v. State of Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985), Cert. Den. 106 S.Ct. 792 (1985). Perhaps it would be more appropriate for Petitioner to take these matters up with Oklahoma's Congressional delegation.

Both the state and federal district court were without subject matter and in personam jurisdiction.[15] The Circuit

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[15] Oklahoma's statute providing for service of process is 12 Oklahoma Statute § 2004(1)(c)(5) which corresponds with

(Continued on following page)

Court correctly applied the rules in *Lambert Run Coal Co.* and *Minnesota* in dismissing this cause rather than remanding where derivative jurisdiction of the state court was absent.

CONCLUSION

The Respondents respectfully submit that for the aforegoing reasons the decision of the Tenth Circuit Court of Appeals in this case should be affirmed in all respects.

Respectfully submitted,

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Rule 4(d)(6) Federal Rules of Civil Procedure of the United States District Courts. It permits service of process on those entities "subject to suit". Indian tribes, not being subject to suit causes process to be defective in this case. (The full text is contained in the separate appendix filed by Respondents with the Clerk of the Court.)